INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Statute of the State the validity of which is involved	2
Date of judgment and application for appeal	4
Nature of the case	4
Appendix "A"—Appellant's supplementary brief filed in New York Supreme Court	16
Appendix "B"—Appellant's brief in Supreme Court of New York	18

Table of Cases Cited

Dominiois v. *United States Casualty Co.*, 132 New York Appellate Division 533	15
Frisbee v. *U. S.*, 157 U. S. 157	14
Johnson v. *Risk*, 137 U. S. 300	12
Klinger v. *Missouri*, 13 Wallace 257	12
Kromer v. *Heim*, 75 N. Y. 574	7, 8
Mance v. *Hossington*, 205 N. Y. 33	12
Melenky v. *Mellen*, 206 App. Div. 46, 236 N. Y. 660	7, 11
Moers v. *Moers*, 229 N. Y. 294	7, 11
Moorehouse v. *Second National Bank*, 98 N. Y. 504	7
New Orleans v. *Louisiana Sugar Co.*, 125 U. S. 18	12
Philadelphia Fire Asso. v. *New York*, 119 U. S. 110	12
Reilly v. *Barrett*, 220 N. Y. 170	7, 8

Statutes Cited

Constitution of the United States, 14th Amendment	2
New York Civil Practice Act, Sections 439, 440 and 445	7
Real Property Law of New York:	
Section 280 (being Chapter 77 of the Laws of 1937)	2
Section 281	3
United States Code, Title 28, Section 344a	1

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 560

LESLIE B. FOX,

Appellant,

vs.

CHARLES J. FOX

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

The defendant-appellant, Leslie B. Fox, now presents the following jurisdictional statement, pursuant to Rule 12 of this court, accompanying his petition for the allowance of an appeal to this court from a judgment of the Supreme Court of the State of New York and setting forth the basis upon which it is contended that this court has jurisdiction to review said judgment.

A

The statutory provision believed to confer jurisdiction upon this court to review said judgment is United States Code, Title 28, Section 344-a, upon the ground that the judg-

ment sought to be reviewed was founded upon a statute of the State of New York claimed to be repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States in that said statute and the judgment founded thereon have deprived the defendant-appellant of his liberty and his property without due process of law.

B

The statute of the State of New York involved in the said judgment is Section 280 of the Real Property Law of said State, being Chapter 77 of the Laws of 1937, and being an innovation unknown in the common law relating to executory accords for the settlement of disputed claims theretofore in force in said State.

The following is a verbatim copy of the statute:

§ 280. Executory accord as used in this section means an agreement embodying a promise, express or implied, to accept at some future time a stipulated performance in satisfaction or discharge, in whole or in part, of any present claim, cause of action, contract, obligation or lease of any mortgage or other security interest in personal or real property, and a promise, express or implied, to render such performance in satisfaction or in discharge of such claim, cause of action, contract, obligation, lease, mortgage or security interest.

(2) An executory accord, hereafter made, shall not be denied effect as a defense or as the basis of an action or counterclaim by reason of the fact that the satisfaction or discharge of the claim, cause of action, contract, obligation, lease, mortgage or other security interest which is the subject of the accord was to occur at a time after the making of the accord, provided the promise of the party against whom it is sought to enforce the accord is in writing and signed by such party.

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(3) If an executory accord is not performed according to its terms by one party, the other party shall be entitled either to assert his rights under the claim, cause of action, contract, obligation, lease, mortgage or other security interest which is the subject of the accord, or to assert his rights under the accord.

§ 281. An offer in writing, hereafter made, signed by the offeror, to accept a performance therein designated in satisfaction or discharge, in whole or in part, of any claim, cause of action, contract, obligation or lease or any mortgage or other security interest in personal or real property, followed by tender of such performance by the offeree before revocation of the offer, shall not be denied effect as a defense or as the basis of an action or counter-claim by reason of the fact that such tender was not accepted by the offeror.

The following is the note of the Statutory Revision Commission accompanying the act (Chapter 77, Laws of 1937):

"The occasion for defining executory accord in this subdivision (1) is to exclude from the operation of subdivisions two and three the case where the parties agree to extinguish the existing obligation on the making of the new promise. Under the common law of New York, if an obligee agrees to accept a stipulated performance at some future time in satisfaction of any obligation and the obligor agrees to render the stipulated performance, neither is bound until performance is fully made and accepted. Either party can enforce his rights under the original obligation notwithstanding the fact that there has been no breach of the new agreement. The purpose of this sub-division (2) is to make an executory accord binding on both parties subject to the provision of Sub-division three."

C

The decree sought to be reviewed was entered in the office of the clerk of Cattaraugus County, New York, on the 1st day of July 1947 upon the report of a referee appointed to hear, try and determine the cause. An appeal was taken to the Appellate Division of said Supreme Court. That court affirmed the decree without opinion and judgment of affirmance was entered on its order on July 29th, 1948. Notice of motion in said Appellate Division for permission to appeal to the Court of Appeals of said state was served on July 14th, 1948 returnable September 20th, 1948. Said motion was denied without opinion by an order dated September 20th, 1948 and was served on October 9th, 1948.

Thereupon a motion was made in the Court of Appeals for permission to appeal to that court from said judgment and order of affirmance by said Appellate Division, returnable on November 15th, 1948. On November 24th, 1948 said motion was denied without opinion and notice of said decision given by the clerk of the court. That said order of said Court of Appeals was made the order of said Supreme Court by an order of the latter court granted on November 30th, 1948 and entered in Cattaraugus County on December 1st, 1948 with judgment for the costs of said motion.

This application for the allowance of an appeal to this court is presented this 18th day of December 1948.

Nature of the Case

The action is brought for the specific performance of an alleged agreement to convey real estate, to wit; a farm in the town of Ellicottville, Cattaraugus County, New York.

The answer alleged that the alleged contract was without any consideration whatever.

The alleged contract is in writing and reads as follows:

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"Memorandum of agreement to settle dispute between Charles Fox and Leslie Fox. Leslie Fox to deed to Charles Fox the so-called Cox Farm.

Charles Fox has title to and is entitled to possession of 10 cows and 8 yearlings now on Hess Farm (9 of the cows originally were sold by Leslie to Charles).

Leslie Fox is to get possession of and title to 2 heifers and 9 calves (these calves were raised on the Hess Farm).

Charles is to execute a general release running to Leslie and Leslie will execute a general release running to Charles.

Charles to save Leslie free and harmless on notes that have been discounted at Bank of Ellicottville and that have been indorsed by Leslie.

Leslie is entitled to the following located on Cox Farm: corn binder, cultivator, scales and motor.

Charles is entitled to the following located on Hess Farm: chicken brooder and chicken feeding equipment.

Charles Fox agrees to remove his cows and yearlings on or before December 31, 1946.

CHARLES FOX,
LESLIE FOX."

See Record in state Court, Page 5, Folio 15; and Page 9, Folios 26 to 29.

The learned referee rendered a memorandum opinion as follows:

"In the above entitled case I find that on December 21st, 1946 there was an actual dispute between the parties; that they made an agreement at that time to settle the same and by the terms of that agreement the defendant was to deed to plaintiff the so-called Cox Farm and therefore the plaintiff is entitled to a judgment compelling a specific performance on the part of the defendant by delivering to

plaintiff a deed of said real property free and clear of all liens and incumbrances."

See Record, Page 14, Folio 42.

The learned referee made a decision stating his findings of fact and conclusions of law upon which the judgment was entered by which it was decreed that the defendant execute and deliver a conveyance of the said Cox Farm to the plaintiff.

A summary of the findings is as follows:

That, on December 21st, 1946 (the day when the alleged contract was made) the plaintiff was in possession of the said Cox Farm, and that the defendant was the owner of the legal title thereto. (Folio 25).

That, upon requests submitted by the defendant and appellant the referee found that there was no specific agreement between the parties with regard to the operation of the Cox Farm. (48th Proposed Finding, Folio 70).

The referee further found that all that the plaintiff did in connection with the operation of the Cox Farm was to help the defendant's employees plant and harvest the crops and to dispose of them and collect the proceeds, procure repairs to be made to the buildings and collect the rent of the house. (51st Proposed Finding, Folio 72).

In the report the learned referee also found: that the alleged agreement above set forth was made and signed, setting forth a copy thereof. That the said Cox Farm was described as set forth in detail. (Folios 26 to 31).

That the plaintiff had duly performed all of the conditions of the alleged contract on his part and had delivered to the defendant all of the property to which the defendant was entitled and executed the release and had paid the (accommodation) notes therein referred to. That the defendant had failed and refused to execute and deliver to

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the plaintiff a deed of said Cox Farm. (Folios 31 & 32; as to the notes, 67th Finding, Folio 83).

As conclusion of law the referee found that the plaintiff was entitled to judgment for specific performance by the execution and delivery of a deed of the farm. (Folio 33).

Under the Civil Practice Act of New York, there is no provision under which a party may require a referee to state the grounds upon which judgment is directed. The submission of the cause is deemed to be a motion for judgment upon any and all grounds and exception is deemed to have been taken accordingly. The parties may submit requests "to find essential facts" which shall be deemed to have been refused unless expressly found. The decision must "state the facts which it (he) deems essential," and exceptions are deemed to have been taken thereto.

New York Civil Practice Act, §§ 439, 440 and 445.

The defendant-appellant was, therefore, unable to require the referee to rule whether his decision was based on common law rules or upon the statute now claimed to be repugnant to the Fourteenth Amendent of the Federal Constitution.

Up to the time of the effective date of this statute the common law rules relating to accord and satisfaction and to executory accords prevailed.

Kromer v. *Heim*, 75 N. Y., 574, 576 & 577.
Moorehouse v. *Second National Bank*, 98 N. Y., 504.
Reilly v. *Barrett*, 220 N. Y., 170.
Moers v. *Moers*, 229 N. Y., 294.

Melenky v. *Mellen*, 206 Appellate Division 46; Affirmed and certified questions answered in the negative; 236 N. Y. 660.

Had the referee rendered an opinion expressly stating that his conclusion of law was that this document amounted

to a complete common law accord and satisfaction of the plaintiff-appellee's claims, in and of itself; that by its terms the plaintiff-appellee accepted the promise to make a deed of the Cox Farm in the future as a complete satisfaction, then and there, (rather than that he thereby agreed to discharge his claims when the deed itself was delivered), obviously there would be no Federal question reviewable by this Court. But if he held that this document came within the provisions of Section 280 of the Real Property Law although not good at common law then the question is presented whether that statute deprives the defendant-appellant of liberty or property without due process of law.

Had the referee decided that the plaintiff-appellee was entitled to judgment under the common law it would have been necessary to find something more than the mere execution of the document by which the parties agreed "to settle" their dispute. It was necessary to find facts showing that they thereby actually and finally settled the dispute and extinguished the claim. The intent of the parties was a question of fact. That is the very distinction between an accord and satisfaction and an executory accord.

"Where performance is the thing to be taken in satisfaction, then, until performance there is no complete accord."

Kromer v. *Heim*, 75 N. Y. 574, 577.

"In any event the defendant who seeks to set up this defense as a bar to the original action must allege and prove both the accord and the satisfaction. If his claim be that his promise was accepted in satisfaction, that he must plead. The burden is upon him to show the existence of a bar. (*Babcock* v. *Hawkins*, 23 Vt. 561)."

Reilly v. *Barrett*, 220 N. Y. 170, 173.

Had the plaintiff-appellee sued upon his original claims, instead of for a specific performance of the accord, the

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defendant-appellant if he stood upon the accord would have been obliged to plead and prove that the promise to make the deed was accepted by the plaintiff-appellee as a complete satisfaction of the claims. Therefore the plaintiff-appellee was also obliged to allege and prove that fact. He cannot recover upon the accord unless it was also a satisfaction and destruction of the claim in and of itself. There would be no consideration for the accord unless there was a present satisfaction of the claim.

Therefore the referee either based his decision on the statute which attempts to convert a purely executory accord into a binding contract contrary to the express intention of the parties, or he was mistaken about the common law.

The opinion of the referee shows that all that he considered essential was the fact that there was a dispute, regardless of its character or substance; that the parties agreed "to settle" it, (not that they thereby settled it), and that the defendant-appellant thereby agreed to deliver a deed at some future unspecified time with a general release upon the delivery of a like release from the plaintiff-appellee.

Upon the appeal to the Appellate Division of the Supreme Court the cause was presented by both parties, both in the briefs and on the argument, under the common law rule. The statute above set forth was not invoked by the plaintiff-appellee.

After hearing both parties, the Court raised the question with regard to this statute; the text was procured and examined by the court but not read although defendant-appellant's counsel stated that he had never seen it. The Presiding Justice then stated to the defendant-appellant's counsel that defendant-appellant was probably right under the common law rules but that the statute controlled. Counsel asked permission to file a supplementary brief which was granted and a brief was submitted contending

that, from the language of the statute, it could not be construed to be designed to make an executory accord equivalent to an accord and satisfaction and that it did not in fact purport to accomplish that result when strictly construed. That, being in derogation of the common law, it must be so construed.

Upon the motion of the defendant-appellant in said Appellate Division for leave to appeal to the Court of Appeals the defendant-appellant served and submitted a brief expressly raising the question as to the constitutionality of the statute in that it denied equal protection of the law to both parties because of the provision for the abrogation of the accord by one party in case of default by the other; that it impaired the obligation of contracts by making a contract for the parties contrary to their intent and that it undertook, as construed by the court, to impose a liability under an agreement (not a contract) without any consideration. Upon those grounds it was urged that the appeal to the Court of Appeals should be allowed in order that those questions might be determined by the court of last resort in the state, as will appear by the brief a copy of which is herewith submitted.

That the notice of the motion in the Court of Appeals for leave to appeal to that court expressly stated the grounds upon which it was made, to wit: that the findings of the referee did not support his decision under the common law because they showed only an executory accord which is not actionable; that Section 280 of the Real Property Law is unconstitutional in that it violates the constitutional provisions for due process of law, for the divers reasons therein pointed out as will appear by the motion papers, including the brief, herewith submitted. That, as appears by the brief on said motion, said statute has never been applied except in one case in a court of minor jurisdiction

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and no question as to its constitutionality was there considered.

The constitutionality of the statute in question was presented at the first opportunity. None of the decisions in the state courts state the grounds upon which they were rendered, whether under the common law rules or under the statute.

There is nothing in the record to indicate that the decisions were based on the common law. There were two decisions in the Court of Appeals involving the question as to whether the accord amounted to a substituted contract made and taken as satisfaction or whether it was only an agreement upon the terms upon which the satisfaction was to be rendered in the future.

Moers v. *Moers*, 229 N. Y. 294;
Melenky v. *Mellen*, 236 N. Y. 660, affirming 206 Appellate Division 46 and answering certified questions.

In the *Moers* case the accord was construed to be a new contract upon sufficient new considerations.

"Whether there is an accord and satisfaction ordinarily involves a pure question of intention which is, as a rule, a question of fact. If the evidence directly or through reasonable inference creates no conflict concerning the intention, it is a question of law."

Moers v. *Moers*, 229 N. Y. 294, on page 300.

In the *Melenky* case the accord was, in most respects, much like the one in the *Moers* case. The distinguishing feature is that, in the *Melenky* case there were no new considerations outside the matters involved in the dispute.

One of the certified questions was:

> "Was there a new and superior contract superseding and extinguishing the claims and rights upon which plaintiff's complaint is based?"

The answer was in the negative.

In this case there was no finding of any new considerations. The cows, calves and farm implements concededly belonged to the respective parties; there was no transfer of title to any of them; and the release found to have been "executed" was tendered conditionally upon the delivery of the deed and amounted to a practical construction of the accord as a purely executory one. The notes were made for the appellee's accommodation. All these things, aside from the release, involved only legal duties.

See Folios 129 and 130 as to the release.

Findings 7, 8 and 9 as to the scope of the dispute. Folios 47 & 48.

Mance v. *Hossington,* 205 N. Y. 33, 36 as to consideration.

Finding 67, Folio 83 as to notes.

Had the decisions been based on the common law some indication seems to have been called for showing why this case was more analogous to the *Moers* case than to the *Melenky* case and why the statute in question did not control.

The authorities which the defendant-appellant thinks sustain the jurisdiction of this Court are:

Klinger v. *Missouri,* 13 Wallace 257;
Johnson v. *Risk,* 137 U. S. 300;
Philadelphia Fire Asso. v. *New York,* 119 U. S. 110;
New Orleans v. *Louisiana Sugar Co.,* 125 U. S. 18, 38.

The defendant-appellant understands these causes to hold that where the decision of the state court may have been based either on a question of purely state concern or upon one involving the constitutionality of a state statute under the Federal Constitution, and the state court has not indicated that its decision was based upon the previous state law, wholly or in the alternative, this Court is called upon

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to examine the case to determine whether the decision can be sustained under the previous state law and, if it cannot, a Federal question is presented; if the decision cannot be sustained under previous state law, it will be presumed that it was based upon the statute drawn in question, rather than to presume that the state court made an erroneous decision under the preceding law and ignored the statute.

In the Appellate Division the Court did state informally that its decision was based upon the statute but refrained from doing so in the order. Its attention was called to the oral statement in the brief on the motion for leave to appeal to the Court of Appeals and was not corrected by the order denying that motion.

The statute in question does not provide, in express terms, that an executory accord is equivalent to an accord and satisfaction. However, if it does not so provide it is meaningless and inoperative. It provides that the accord "shall not be denied effect" merely because unexecuted when made. But it does not state what effect it shall have. Unless it means that it shall have the effect of an accord and satisfaction it has no effect whatever because an executory accord, under the law as then established, had no effect. The Reviser's Note states that the purpose was to make the accord binding. It could not be binding except it be made equivalent to an accord and satisfaction.

The defendant-appellant submits that, even if this Court should construe the statute as meaningless, there is still a federal question. If the state courts based their decisions on the statute, construing it to make an accord equivalent to an accord and satisfaction, the defendant-appellant has been deprived of due process of law nevertheless, and under the statute.

That this Court should decide whether or not the statute is repugnant to the Fourteenth Amendment because of its

phraseology or because, if given the interpretation made by the state courts, it deprives the party of liberty and property without due process of law.

Why the questions involved are claimed to be substantial

The statute attempts to convert, by legislative fiat, a mere proposal to settle a disputed claim with no present consideration, into a binding executory contract, equivalent to an accord and satisfaction, providing it be consummated, but, if not, into an option, binding only on a party who signed a written promise to pay or to accept payment, and available to one who did not, to treat it as a satisfaction or to revert to the status quo ante.

That it thereby destroys the freedom of contract.

Frisbee v. *U. S.*, 157 U. S. 157.

That the legislature of the State of New York cannot make a contract for private parties nor, by fiat, make their contract mean something not intended by them as established by the courts long before the adoption of our constitutions.

That under the fundamental law a contract without consideration is void. That it has been held since time immemorial that an executory accord is without consideration. That liability on such a void contract cannot be imposed by the legislature. If the necessity for a consideration in private contracts is to be abolished it must be done by constitutional amendment.

That there is no mutuality in the contract attempted to be made by the statute for the parties. It provides for a unilateral option to treat the memorandum as a contract or to repudiate it.

As applied to executory accords, this statute abrogates the whole law of private contracts; the meeting of the minds, consideration and mutuality. If the Legislature can, under the Fourteenth Amendment, so enact with refer-

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ence to one form of contract, it may do likewise as to any or all contracts.

If the statute in question is valid, it will lead to serious abuses. An unscrupulous claim agent, authorized by his employer to settle claims against it, may procure a written promise to accept a given sum, agree orally to pay it and thus bind the claimant as firmly as by a release under seal but not binding his principal at all. In such case the claimant could only avoid the accord by proof of fraud or mistake. Many such releases have been obtained with payment of the amount agreed upon and set aside later for fraud or mistake. Under this statute, as applied in this case, not only would such a claimant be bound to accept the sum stated, even though subsequent events proved it to be grossly inadequate, but, if the insurance company concluded that the amount was too large, the claimant could not collect even the amount agreed upon under the accord because the insurer did not sign the memorandum. This danger is not fanciful.

Dominiois v. *United States Casualty Company*, 132 New York Appellate Division 553.

In the case cited it appeared that both parties understood that the injury was not serious; that was the mutual mistake. But it was necessary to prove that the claim agent acted on that basis and with that understanding. The mere fact that the injury proved more serious than appeared at the time would not show a mutual mistake.

CHARLES E. CONGDON,
DANA L. JEWELL,
Counsel for Appellant.

APPENDIX "A"

STATE OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

CHARLES J. FOX, *Plaintiff-Respondent,*

vs.

LESLIE B. FOX, *Defendant-Appellant*

Appellant's Supplementary Brief

(*Real Property Law*, § 280; *Personal Property Law*, § 33-a)

These statutes do not pretend to make an executory *accord* equivalent to *an accord and satisfaction.* By its terms it relates only to *executory accords* containing a *promise* of future *satisfaction.*

> "An executory accord • • • means an agreement • • • to accept at some future time *a stipulated performance* in *satisfaction* • • • of any present claim • • • and *a promise* • • • to render such performance in satisfaction • • • of such claim • • •."
>
> "An executory accord • • • shall not be *denied effect* as the basis of an action • • • by reason of the fact that the satisfaction • • • was to occur at a time after the making of the accord • • • providing the promise • • • is in writing • • •."
>
> "If an executory accord is not performed • • • by one party the other party shall be entitled to *assert his rights* under the *claim* • • • or to assert his rights under the accord."

This does not pretend to make the accord conclusive upon the parties. It does not pretend to make the accord conclusive evidence of a sufficient consideration. The original claim is not extinguished. The party may fall back on that if he wishes. He may only *assert* such rights as he may have under the accord as a new contract.

Under the former rule an executory accord was, as a matter of law, without consideration. It did not matter what

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mutual covenants or *promised* considerations it might contain so long as they related wholly to the matters in dispute. A new contract had to be one involving new elements and new considerations independent of the dispute in order to amount to a *satisfaction.*

The total lack of consideration (or denial of effect) was predicated on the fact that, no matter what the terms of the accord might be, there was no consideration, *even for mutual covenants,* because non-performance left the parties precisely where they were before the accord was made.

This statute merely abolishes that conclusive presumption, that total and absolute denial of effect, and leaves the accord to be enforced *for whatever it may be worth* on its face and according to its own terms. It adds nothing to those terms and it does not provide that any such agreement, regardless of its terms, is a complete merger and extinction of the claim or *a delivery of the satisfaction.* It does not say that such an accord shall be equivalent to an accord *and satisfaction.* It could not do so and yet leave the option to stand either upon the accord or the original claim.

This statute is in derogation of the common law and is to be strictly construed.

McManus v. *Gavin,* 77 N. Y. 36.

Perople v. *Levin,* 119 App. Div., 233; affirmed 194 N. Y. 554.

Perople v. *Mallon,* 166 App. Div. 840.

There is a wide and fundamental distinction between an accord and a satisfaction.

An original contract to make a gift is not enforceable for want of consideration, and an executory accord to do the very same thing, under the guise of settling a dispute about whether there had been previous promises to make similar gifts, is not endowed with any greater vitality or validity by this statute.

This agreement is, in effect, simply one to convey this farm in satisfaction of alleged promises to make gifts of the sums claimed by the plaintiff. If those alleged promises were nothing but prospective gifts, then this agreement is

merely a promise to convey the farm as a substituted gift rather than to pay them in money.

On the other hand, where there has been an accord and *completed satisfaction* by the act of the party, the question of *actual* consideration is of no importance because, even if a gift, the promise is accompanied by delivery by the party himself and therefore irrevocable.

APPENDIX "B"

SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

CHARLES J. FOX, *Respondent,*

vs.

LESLIE B. FOX, *Appellant*

Appellant's Brief

Motion for leave to appeal to the Court of Appeals

The appellant has made no motion for a re-argument for the reason that, no opinion having been rendered, he cannot point out anything specifically that he thinks the Court overlooked.

There are two possible grounds for the affirmance. One that this agreement involved new elements which constituted a new consideration within the case of Moers *v.* Moers. The other that the agreement is binding as a new agreement in writing and can be specifically enforced under Real Property Law § 280 because that statute provides that either party "may assert his rights" under it, but fails to provide what such "rights" shall be and creates no new rights except that the agreement shall not be denied effect solely because performance is postponed.

First

In view of what was said on the argument, the appellant assumes that the affirmance was based upon Real Property

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Law § 280. If so, that statute ought to be construed and its constitutionality determined by the Court of Appeals. It has been in effect for 11 years and has never been passed upon. In the only two cases in which it has been cited in an appellate court, no comment was made upon it but the cases were decided contrary to its provisions under the common law rule and expressly on the ground that, inherently, an accord is not a complete contract unless accepted as a satisfaction or the satisfaction is paid or delivered at the time. The decisions were not placed on the ground that an out-moded rule of the common law controlled because the contract under consideration was made prior to the enactment of the statute. The court took pains to point out that the accord was necessarily incomplete without satisfaction regardless of the statute and not because it had been previously so decided by the courts for several hundred years.

Atterbury *v.* Walsh Paper Company, 261 App. Div., 529.
Matter of Campbell, 256 App. Div., 693.

This incompleteness gives rise to several serious problems.

In the first place it renders the constitutionality of the statute very doubtful on two grounds. It provides that either party may repudiate it, if not performed according to its terms, and sue upon the original claim. In the case of mutual claims, either party may abrogate it without the consent of the other. In cases where the accord provides for the payment of an agreed amount to the claimant, only the claimant may abrogate it the instant that default is made, but there is nothing for the debtor to abrogate; no rights that he can assert under the original conditions.

This violates two constitutional provisions; it is not due process of law because it denies the equal protection of the law to both parties. By legislative fiat it permits the abrogation of what is supposed to be a binding contract at the caprice of either party without the consent of the other, instead of leaving their rights to be settled by legal process; by due process of law. Instead of making it a binding contract it makes it a purely tentative one; an option to

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CHARLES ELMORE CROPL
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 560

LESLIE B. FOX,

Appellant,

vs.

CHARLES J. FOX.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

ALFRED M. SAPERSTON,
Counsel for Appellee.

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
The record fails to show that any federal question involving the obligations of contracts was necessarily decided by the New York Court of Appeals	6
The record fails to show that any federal question involving a denial of due process of law was necessarily decided by the New York Court of Appeals	11
The record does not present for decision any substantial federal question	15
Motion to dismiss or affirm	17, 19

Table of Cases Cited

Atterbury v. *Walsh Paper Corp.*, 261 App. Div. 529, 286 N. Y. 578	14
Backus v. *Ford Street U. D. Co.*, 169 U. S. 557	15
Balsam v. *National Retailers Mutual Insurance Co.*, 182 Mis. 19 (N. Y.)	9, 13
Barnes v. *Ryan*, 66 Hun. 172	6
Johnson v. *Risk*, 137 U. S. 300	11
Kane Realty Co. v. *National Children's Stores*, 169 Misc. 699	14
Klinger v. *Missouri*, 13 Wall. 257, 80 U. S. 635	10
Liberty Warehouse Co. v. *Burley*, 276 U. S. 71	15
Milman v. *Denniston*, 271 App. Div. 998, 297 N. Y. 470	14
Moers v. *Moers*, 229 N. Y. 294	7
Munn v. *Gelinois*, 94 U. S. 133	15
New Orleans Waterworks Co. v. *Louisiana Sugar Refining Co.*, 125 U. S. 18	10
Parkersburg v. *Parkersburg*, 107 U. S. 691	15
Post v. *Thomas*, 212 N. Y. 273	6

Page

Rudnick v. *Fishbeck*, 158 F. (2d) 940 14
Salinas v. *Salinas*, 187 Mis. 509, 271 App. Div. 517 14
Second Employers' Liability Cases, 223 U. S. 1 15
Southern R. Co. v. *Greene*, 216 U. S. 400 15
Tinsley v. *Anderson*, 171 U. S. 101 15
Very v. *Levy*, 13 How. 345 ..... 8, 9
Walker v. *Sauvinet*, 92 U. S. 678 15
Yonkers Co. v. *Royal Ins. Co.*, 247 N. Y. 444 6

STATUTES CITED

Constitution of the United States, 14th Amendment .. 15
Personal Property Law of New York, Section 33 .... 13, 14

Real Property Law of New York:
Section 279 ..... 13, 14
Section 280 ..... 8, 9, 10, 11, 12, 13, 14

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 560

LESLIE B. FOX,

Appellant,

vs.

CHARLES J. FOX,

Appellee.

STATEMENT OPPOSING JURISDICTION

This action was brought by the appellee to procure a judgment compelling specific performance by the appellant of a written agreement to deliver to appellee a deed of certain real property.

The written agreement was entered into on December 21st, 1946, by the parties after an extended conference between the parties and their attorneys (Record Page 42, Folios 124-126, Page 89, Folios 266-267), and discussion of various claims, counterclaims and disputes between the

parties. (Record Page 32, Folio 94; Page 41, Folio 123: Page 90, Folio 269; Page 94, Folio 280; Page 143, Folio 429).

As a result thereof a settlement of all such disputes, differences, claims and counterclaims was arrived at (Record Page 42, Folio 124; Page 92, Folio 276; Page 94, Folio 280), and the terms of settlement reduced to the written agreement (Record Page 42, Folio 124; Page 42, Folio 125; Page 94, Folio 280), which was signed by the parties and witnessed by their attorneys (Record Page 12, Folio 125; Page 42, Folio 126 and Page 94, Folio 281).

The appellant admits signing the agreement (Record Page 142, Folio 428; Page 144, Folio 432).

The appellee duly performed all of the terms and conditions of said agreement but the appellant failed and refused to execute and deliver to appellee a deed of the said Cox Farm and the Official Referee so found (Record Page 11, Findings 5 and 6, Folios 31-32).

The Official Referee in his Report made the following findings of fact (Record Pages 9 and 10, Folios 26-29):

> 3. That on the 21st day of December, 1946, plaintiff and defendant in consideration of and in settlement of a dispute between them, entered into a written agreement, a copy of which is as follows:
>
> "December 21, 1946.
>
> Memo of agreement to settle dispute between Chas. J. Fox and Leslie Fox:
>
> Leslie Fox to deed to Chas. Fox the so-called Cox Farm.
>
> Charles Fox has title to and is entitled to possession of 10 cows and 8 yearlings now on Hess Farm (9 of the cows originally were sold by Leslie to Charles).
>
> Leslie Fox is to get possession of and title to 2 heifers and 9 calves (these calves were raised on the Hess farm).

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Charles is to execute a general release running to Leslie and Leslie will execute a general release running to Charles.

Charles is to save Leslie free and harmless on notes that have been discounted at Bank of Ellicottville and that have been endorsed by Leslie.

Leslie is entitled to the following located on Cox farm: corn binder, cultipacker, scales and motor.

Charles is entitled to following located on Hess farm: chicken brooder and chicken feeding equipment.

Charles Fox agrees to remove his cows and yearlings on or before December 31, 1946.

CHARLES J. FOX,
LESLIE B. FOX.

Witness:
HOWARD T. SAPERSTON,
JOHN W. ELLIS."

(Found: P.S., O. R.)

The Official Referee made the following conclusions of law (Record Page 11, Folio 33):

That plaintiff is entitled to judgment against defendant as follows:

1. Adjudging that defendant specifically perform said agreement by executing and delivering to plaintiff a deed of said real property free and clear of all liens and incumbrances.

(Found: P. S., O. R.)

2. That plaintiff have costs against defendant.

(Found: P. S., O. R.)

The Official Referee rendered a memorandum opinion as follows (Record Page 14, Folio 42):

In the above entitled case I find that on December 21st, 1946, there was an actual dispute between the parties; that they made an agreement at that time to settle the

same, and by the terms of that agreement the defendant was to deed to plaintiff the so-called "Cox Farm", and therefore the plaintiff is entitled to a judgment compelling a specific performance on the part of the defendant by delivering to plaintiff a deed of said real property free and clear of all liens and encumbrances.

The Official Referee refused to find the following Requests of Appellant (Record page 25, Folio 73. Findings of Fact (Requested by Appellant)):

53. That at the time of the alleged settlement of the alleged dispute there was no controversy as to any material facts between the parties.

(Refused: P.S., O.R.)

(Record Page 27, Folio 81):

63. That there was no compromise concerning any of the claims of the plaintiff upon the execution of said memorandum annexed to the complaint.

(Refused: P.S., O.R.)

(Record Page 27, Folio 81):

64. That all of the claims of the plaintiff were allowed in full.

(Refused: P.S., O.R.)

(Record Page 28, Folio 82):

65. That no concession or compromise was made by the plaintiff with regard to any claim on the part of the defendant.

(Refused: P.S., O.R.)

Conclusions of Law (requested by Appellant) (Record Page 29, Folio 86):

1. That said memorandum of agreement annexed to the complaint was without any adequate consideration moving from the plaintiff to the defendant.

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(Refused: P. S., O. R.)

(Record Page 29, Folio 87):

2. That upon the execution of said memorandum agreement annexed to the complaint no claim or demand on the part of the defendant against the plaintiff was in dispute and no such claim was compromised.

(Refused: P. S., O. R.)

(Record Page 29, Folio 87):

3. That the plaintiff's claims were allowed in full.

(Refused: P. S., O. R.)

(Record Page 30, Folio 88):

4. That said alleged compromise agreement was without any adequate consideration.

(Refused: P. S., O. R.)

(Record Page 30, Folio 88):

5. That said alleged compromise agreement was inequitable and unfair and will not be enforced by specific performance in a court of equity.

(Refused: P. S., O. R.).

Judgment granting appellee the relief requested was entered July 1st, 1947.

Upon the trial before the Official Referee no reference was made by either party to Section 280 of the Real Property Law of the State of New York, nor was it referred to by the Referee.

Upon the appeal to the Appellate Division said Section 280 was mentioned for the first time by the Court, as a result of which both parties filed Supplemental Briefs. The Appellate Division then affirmed the Referee's judgment, without opinion, and never stated formally or informally the basis of its affirmance.

I

The Record Fails to Show That Any Federal Question Involving the Obligations of Contracts Was Necessarily Decided by the New York Court of Appeals.

The Official Referee did not refer to Section 280 of the Real Property in his Findings of Fact and Conclusions of Law, or in his opinion, and neither party ever referred to or relied upon the provisions of said statute. The Appellee relied upon the validity and enforceability of the agreement as a settlement agreement under the common law of New York State, as established by the State Courts. Our highest court, the Court of Appeals has held:

> "A contract of settlement, if valid in itself, is final and is to be sustained by the court without regard to the validity of the original claim."
>
> *Yonkers Co. v. Royal Ins. Co.*, 247 N. Y. page 444.

> "The law wisely favors settlements, and where there is a real and genuine contest between the parties and a settlement is had without fraud or misrepresentation for an amount determined upon as a compromise between the conflicting claims, such settlement should be upheld although such amount is materially less than the amount claimed by the person to whom it is paid."
>
> *Post* v. *Thomas*, 212 N. Y. pages 273-4.

> "When parties meet on equal terms and adjust their differences, both are concluded from further litigation of the matter . . . In such a case it matters not on which side the right ultimately turns out to be; the court will not look beyond the compromise."
>
> *Barnes* v. *Ryan*, 66 Hun, page 172.

These cases were before the Referee in appellee's trial brief. The Referee specifically found, "That on the 21st day of December, 1946, plaintiff and defendant in consideration of and in settlement of a dispute between them, entered into

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a written agreement—" (Record Page 9, Folio 26); and in his opinion stated, "I find that on December 21st, 1946, there was an actual dispute between the parties; that they made an agreement at that time to settle same—" (Record Page 14, Folio 42). The Referee as heretofore stated refused appellant's requests to find that at the time of the settlement there was no dispute, that there was no compromise concerning claims of appellee and appellant, and that the settlement agreement was without consideration. It is thus apparent that the Referee's decision and judgment in favor of appellee were based upon the common law of the State of New York. The existing common law was and is sufficient authority for such decision.

In the Appellate Division, appellee in the first instance relied upon said common law as established by the above cited authorities, and the further authority of *Moers* v. *Moers*, 229 N. Y. 294, a case involving an agreement similar to the instant agreement. There the court at pages 300-301 stated:

> "The contract in the instant case is *not a mere accord*, or an accord executory. *It is a new and superior contract superseding and extinguishing the contract or contracts upon which the original action between the parties was based*, and the action itself. *It relates to matters of differences and controversies other than*, as well as, *those involved in the original action.* It concerns all the claims and grievances of the plaintiff against the defendant and of the defendant against the plaintiff. Each party enters into new agreements and assumes new obligations. Mutual releases shall be executed extinguishing all disputes and controversies between them. *Those new and reciprocal covenants and obligations were considerations legally sufficient to invest the contract with completeness and binding effect* • • •. Refusal by the defendant to receive the moneys accomplished nothing. It did not extinguish her agreements or absolve her from the obligations they created.

> It is enough that the agreements of the parties were new or created by the contract, were absolute and not dependent or conditional, were reciprocal and affected legal rights of either or both of the parties—a case of mutual promises, one of which is the consideration for the other."

and further on pages 301-302:

> "The agreement set forth in the complaint was valid and binding upon both parties. It expressly contracted that each party should execute and deliver to the other a general release. It, as a matter of law, makes manifest the intention of the parties that the original action and all disputes and controversies between them were merged into it. There was sufficient legal consideration in it. The plaintiff had duly offered to perform on his part. The defendant threatens and intends to prosecute the original action and to withhold wholly performance on her part. The allegations of the complaint permit the plaintiff to invoke equitable jurisdiction. (Very *v.* Levy, 13 How. (U. S. 345; Burke *v.* Burke, 212 N. Y. 303, 307.)"

It is to be noted that the above principles of common law established and recognized by the courts of New York State, were also recognized by this court in the case of *Very* v. *Levy, supra,* which was decided by this court in 1851.

The Appellate Division, after presentation of the appeal by Appellant and Appellee, enquired about the possible effect of Section 280 of the Real Property Law, and thereafter both parties filed supplemental briefs. This was the first time said Statute was referred to by either party or the court. Said Statute was enacted by the State Legislature in 1937, effective March 18, 1937, with minor amendment effective April 5, 1944, and was thus in effect several years before the agreement in question was made. It therefore could not affect the agreement retroactively or deprive either party of vested rights under said agreement.

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Appellee in his supplemental brief advised the Appellate Division that Section 280 of the Real Property Law had not been referred to as it was appellee's contention that the settlement agreement of December 21, 1946, was a superseding contract, and governed by the common law as laid down in *Moers* v. *Moers* (*supra*). That as such a superseding agreement, it was specifically excluded from the operation of said statute by subdivision (1) thereof. The Law Revision Commission which in 1937 recommended the passage of this Statute, in its report said, (cited in *Balsam* v. *National Retailers Mutual Insurance Co.*, 182 Mis. 19) N. Y.:

> The reason for defining executory accord in this subdivision (1) is to exclude from the operation of subdivisions two and three the case where the parties agree to extinguish the existing obligation immediately on the making of the new promise. • • •

Such superseding agreement is enforceable in its own right as held by New York Court of Appeals in *Moers* v. *Moers* (*supra*), and by this court in *Very* v. *Levy*, 13 Howard (US) 345, and therefore does not need the benefit of the provisions of Section 280 of the Real Property Law of New York.

Appellee in his supplemental brief to the Appellate Division stated that even if that court found the settlement agreement not enforceable as a superseding agreement on the authority of *Moers* v. *Moers* (*supra*), there was no question that the agreement was in writing and signed by the appellant personally. That thus the agreement, if not found to be a superseding agreement, was an executory accord enforceable by the court under Section 280 of the Real Property Law, as it fully complied with the provisions and requirements of that Statute. That the appellee in such event was entitled to the same relief under Section 280 as he would be entitled to under the common law.

The Appellate Division affirmed, without opinion, and the Court of Appeals by refusing appellant permission to appeal in effect affirmed the Appellate Division. Appellee in his brief to the Court of Appeals reiterated his reliance in the first instance on the common law, authority of *Moers* v. *Moers* (*supra*), and that in any event appellee was entitled to the same relief under Section 280 of the Real Property Law.

As stated in *New Orleans Waterworks Company* v. *Louisiana Sugar Refining Company*, 125 U. S. 18,

> "This court has no jurisdiction of a writ of error to the highest court of a State, on the ground that the obligation of a contract has been impaired unless some legislative act of the State is upheld by the judgment sought to be reviewed; and when the state court gives no effect to a law of the State subsequent to the contract, but holds, upon grounds independent of that law, that the right claimed was not conferred by the contract the writ of error must be dismissed for want of jurisdiction."
>
> "When the State Court decides against a right claimed under a contract, and there was no law subsequent to the contract, this Court clearly has no jurisdiction."

In *Klinger* v. *Missouri*, 13 Wallace 257 (80 U. S. 635) this court held:

> "Where the judgment of a State Court might have been based either upon a state law repugnant to the Constitution or laws of the United States, or upon some other independent ground, and it appears that the court did, in fact, base it upon the latter ground, this court will not take jurisdiction of the case even though it should think the decision of the State Court erroneous, and so, also, where it does not appear on which of the two grounds the judgment was, in fact, based, if the independent ground is a good and valid one of itself, this

court will not take jurisdiction; but if not, it will presume that the judgment was based on the state law in question, and will take jurisdiction."

Assuming for the moment that Section 280 of the Real Property Law is repugnant to the Constitution of the United States, inasmuch as the State Courts had a good and valid independant ground to wit, the common law of the State of New York, upon which to base the judgment herein, appellant cannot affirmatively show that the judgment rested on such Statute, and therefore the appeal should be dismissed.

> "Where, in an action pending in a state court, two grounds of defence are interposed, each broad enough to defeat a recovery, and only one of them involves a federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the federal question: and if this does not affirmatively appear, the writ of error will be dismissed unless the defence which does not involve a federal question is so palpably unfounded, that it cannot be presumed to have been entertained by the state court."
>
> *Johnson* v. *Risk*, 137 U. S. 300.

II

The Record Fails to Show That Any Federal Question Involving a Denial of Due Process of Law Was Necessarily Decided by the New York Court of Appeals.

Appellant contends that Section 280 of the Real Property Law of New York is repugnant to the Fourteenth Amendment of the Constitution of the United States in that it deprives the appellant of his liberty and property without due process of law.

It cannot be disputed that this Statute was enacted years *prior* to December 21st, 1946, the date the agreement in question was made, and therefore did not change a vested right under the agreement.

The Appellant is therefore contending that the Statute destroyed a 'vested right' under a rule of common law.

Section 280 reads as follows:

> 1. Executory accord as used in this section means an agreement embodying a promise express or implied to accept at some future time a stipulated performance in satisfaction or discharge in whole or in part of any present claim, cause of action, contract, obligation, or lease, or any mortgage or other security interest in personal or real property, and a promise express or implied to render such performance in satisfaction or in discharge of such claim, cause of action, contract, obligation, lease, mortgage or security interest.
>
> 2. An executory accord, hereafter made, shall not be denied effect as a defense or as the basis of an action or counterclaim by reason of the fact that the satisfaction or discharge of the claim, cause of action, contract, obligation, lease, mortgage or other security interest which is the subject of the accord was to occur at a time after the making of the accord, provided the promise of the party against whom it is sought to enforce the accord is in writing and signed by such party or by his agent. If executed by an agent, any promise required by this section to be in writing which affects or relates to real property or an interest therein in any manner stated in section two hundred forty-two or section two hundred fifty-nine of the real property law, shall be void unless such agent was thereunto authorized in writing.
>
> 3. If an executory accord is not performed according to its terms by one party, the other party shall be entitled either to assert his rights under the claim,

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cause of action, contract, obligation, lease, mortgage or other security interest which is the subject of the accord, or to assert his rights under the accord. Added L. 1937 § c77, 2; amended L. 1944, c.588§, eff. April 5, 1944.

The intent of this Statute is set forth in the recommendation of the Law Revision Commission in its 1937 Report to the New York Legislature, which is quoted in *Balsam* v. *National Retailers Mutual Ins. Co.* 182 Misc. 16 (N. Y.) at page 19 as follows:

> "Under the common law of New York, if an obligee or claimant agrees to accept at some future time a stipulated performance in satisfaction or discharge of any obligation or claim, and the obligor or person against whom the claim is asserted agrees to render the stipulated performance, neither is bound until performance is fully made and accepted. Either party can enforce his rights under the original obligation or claim, notwithstanding the fact there has been no breach of the new agreement. The purpose of this subdivision (2) is to make executory agreement of accord binding on both parties subject to the provision of subdivision 3".

The counterpart of Section 280 of the Real Property Law was enacted at the same time as Section 33-a of the Personal Property Law. In 1936 the Legislature enacted Section 279 of the Real Property Law entitled "Validity of certain agreements made without consideration", and its counterpart as part of Section 33 of the Personal Property Law, under the same title. The effect of all four of these statutes was to make such agreements valid and enforceable although lacking in consideration, and all four are in derogation of the prior common law.

The New York State Courts have consistently held such statutes valid.

The court in *Kane Realty Co.* v. *National Children's Stores,* 169 Misc. 699, held that said Sections 279 and 33 are declarative of the Legislative policy of the state on the subject, and even if constituting acts changing the common law, are valid, since statutes in derogation of the common law may be enacted.

The validity and enforceability of Section 33 of the Personal Property Law was recognized in *Salinas* v. *Salinas,* 187 Mis. 509; aff'd. 271 App. Div. 517. Again in *Rudnick* v. *Fishbeck,* (CCA NY) 158 F. (2d) 940, certiorari denied 300 U. S. 851, the court held that an assignee's claim against a bankrupt was not expungeable because of lack of consideration for the assignment, where under subdivision 4 of Section 33, the assignment needed no consideration.

In *Milman* v. *Denniston,* 271 App. Div. 998, it was held that want of consideration had no legal significance because the executed superseding agreement and formal lease were in writing, citing Personal Property Law, Section 33, subdivision 2. Appeal was dismissed by the Court of Appeals in 297 N. Y. 470.

The Court in *Atterbury* v. *Walsh Paper Corp.,* 261 App. Div. 529, affirmed 286 N. Y. 578, recognized the validity of Section 33-a of the Personal Property Law. The validity of Section 280 of the Real Property Law, it being the counterpart of said Section 33-a of the Personal Property Law, is thus established.

Thus the constitutionality of Section 279 and 280 of the Real Property Law and Sections 33 and 33-a of the Personal Property Law has been passed upon and approved by the highest Court in New York State. The United States Supreme Court, in *Rudnick* v. *Fishbeck* (*supra*) by denying certiorari, recognized the constitutionality of Section 33 of the Personal Property Law, which, similar to Section 280 of the Real Property Law involved here, was in derogation of the common law.

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The Statute in question operates alike on all persons and property similarly situated, and equal protection of the laws and due process of law cannot therefore be said to be denied. *Tinsley* v. *Anderson*, 171 U. S. 101.

The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation.

Southern R. Co. v. *Greene*, 216 U. S. 400.

What is due process of Law in the States is regulated by the law of the State. *Walker* v. *Sauvinet*, 92 U. S. 678. There is no common law of the United States as distinguished from the individual States. *Parkersburg* v. *Parkersburg*, 107 U. S. 691. A person has no property, no vested interest, in any rule of the common law. *Second Employers' Liability* cases, 223 U. S. 1. *Munn* v. *Gelinois*, 94 U. S. 133. Liberty of contract does not preclude reasonable regulation. *Liberty Warehouse Co.* v. *Burley*, 276 U. S. 71.

There is no vested right in a mode of procedure, or in a particular remedy. Each succeeding legislature may establish a different one, providing, only, that in each is preserved the essential elements of protection. *Backus* v. *Ford Street U. D. Co.*, 169 U. S. 557.

III

The Record Does Not Present for Decision Any Substantial Federal Question

The cases offered by the appellant are procedural and in no way affect or are adverse to the principles set forth in the above decisions of this court, but support such principles.

It would seem that any question under the Fourteenth Amendment, either as respects the act or the proceedings,

is foreclosed by previous decisions of this Court, and is so unsubstantial and frivolous as to justify the motion to affirm, if not the motion to dismiss.

Respectfully submitted,

ALFRED M. SAPERSTON,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 560

LESLIE B. FOX,

Appellant,

vs.

CHARLES J. FOX,

Appellee

MOTION

Now comes the Appellee, Charles J. Fox, and moves to dismiss the appeal herein on the ground that the case presents no substantial Federal question, and he further moves, if the motion to dismiss is not granted that this Court affirm the judgment of the New York Court on the ground that the questions on which the decision of this cause depends are so unsubstantial as to need no further argument, all as appears in the Statement Opposing Jurisdiction of this Court filed herewith.

ALFRED M. SAPERSTON,
Counsel for Appellee.

Dated: January 3rd, 1949.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 560

LESLIE B. FOX,

Appellant,

vs.

CHARLES J. FOX,

Appellee

NOTICE OF MOTION TO DISMISS, OR AFFIRM

To Dana L. Jewell, Counsel for Appellant:

Please Take Notice that a motion to dismiss the appeal in the above-entitled cause or in the alternative, to affirm the judgment of the New York Court, has been filed in the Supreme Court of the United States, and that such motion will be submitted to the Supreme Court for consideration, by the Clerk of that court at the proper time in accordance with paragraph 3 of Rule 7.

A copy of the motion to dismiss or to affirm, and of Appellee's Statement opposing jurisdiction is served upon you herewith.

ALFRED M. SAPERSTON,
Counsel for Appellee.

No. 560. Fox *v.* Fox. Appeal from the Supreme Court of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Charles E. Congdon* for appellant. *Alfred M. Saperston* for appellee.

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